

STATE OF WASHINGTON,

V.

Appellant.

ORDER AMENDING OPINION

THE COURT has considered the respondent's letters dated January 8, 2009 and June 8, 2009, requesting clarification of this court's opinion filed on December 16, 2008, and agrees the opinion should be clarified. Therefore,

IT IS HEREBY ORDERED as follows:

1. This court's opinion filed on December 16, 2008, is amended by deletion on page 1, first paragraph of the following:

Accordingly, we reverse and remand.

And the paragraph will be replaced with the following:

Accordingly, we reverse Ms. Christy's convictions and remand.

2. This court's opinion filed on December 16, 2008, is amended by deletion on page 11, first paragraph of the following:

In sum, we conclude the trial court committed reversible error in allowing extensive, unproven propensity evidence against Ms. Christy.

And the paragraph will be replaced with the following:

In sum, we conclude the trial court committed reversible error affecting all of Ms. Christy's convictions when it allowed extensive and unproven propensity evidence against her.

DATED:

FOR THE COURT:

JOHN A. SCHULTHEIS
Chief Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 26490-4-III

Respondent,

Division Three

v.

DONNA LEE CHRISTY,

UNPUBLISHED OPINION

Appellant.

Brown, J. — Donna Lee Christy appeals her multiple Adams County drug-related convictions. She contends the trial court erred in allowing ER 404(b) “bad act” evidence and that insufficient evidence supports one of her convictions. We hold the evidence is sufficient, but conclude the trial court reversibly erred in admitting the bad act evidence. Accordingly, we reverse Ms. Christy’s convictions and remand.

FACTS

The facts are related most favorably for the State under our insufficient evidence review standard noted in our analysis. Ms. Christy co-owned a house in Ritzville where she shared a bedroom on the main floor with her boyfriend, Greg Andrews. On January 20, 2007, Michael Cook and Dee Fortin went to the Ritzville Police Department and said they wanted to assist the police with methamphetamine dealing at Ms. Christy’s residence. The officers decided to use both individuals as confidential

informants.

On January 21, 2007 and February 28, 2007, Mr. Cook made controlled buys of methamphetamine at Ms. Christy's residence. Mr. Cook reported, on January 21, 2007, he purchased the drug directly from Ms. Christy, and on February 28, 2007, he purchased the drug from Mr. Andrews, with Ms. Christy present in the residence. On February 9, 2007, Ms. Fortin made a controlled buy of methamphetamine at Ms. Christy's residence. According to Ms. Fortin, she purchased the drug directly from Ms. Christy. They were not under surveillance while inside Ms. Christy's residence.

On March 4, 2007, the police lawfully searched Ms. Christy's residence, finding 50 to 100, one-square-inch plastic baggies in a dresser top in the main floor bedroom, a digital scale, two police scanners, and a lockbox located in the closet of the main floor bedroom. The officers opened the lockbox using a key taken from Mr. Andrews' belt and found two baggies of methamphetamine, numerous pipes, and \$173 in U.S. currency. The officers found several IOU notes from the residence.

The State charged Ms. Christy with four counts of delivery of a controlled substance, one count of possession of a controlled substance with intent to deliver, and one count of maintaining a premise for drug trafficking. Three of the four delivery counts arose from the controlled buys; the other delivery count arose from a 2006 sale to Karl Wayne Jones, who came forward to the police after the search warrant was executed. The possession with intent to deliver count related to the methamphetamine

found in the lockbox. Ms. Christy pleaded guilty to maintaining a premise for drug trafficking before trial began.

Ms. Christy moved to exclude evidence of uncharged drug sales or activity under ER 404(b). The State argued in response it needed to prove “the methamphetamine was knowingly in the possession of [Ms. Christy] and that she intended to sell [it]” as her business and show “the drugs belong to her or belong to her and [Mr. Andrews], as her accomplice.” 1 Chatterton Report of Proceedings (RP) (Sept. 12, 2007) at 6-7, 8. The State offered that several of its witnesses would testify the methamphetamine they purchased from Ms. Christy came from the lockbox, the same location where the methamphetamine at issue in count V was found. And, the State argued the evidence of other drug sales was relevant because Ms. Christy’s defense was that Mr. Andrews or someone else was responsible for the drug activity.

The trial court ruled admissible, “prior drug dealings involving [Ms. Christy] from the room in question, from the box in question.” 1 Chatterton RP (Sept. 12, 2007) at 11. The trial court reasoned this testimony was circumstantially relevant to prove Ms. Christy’s possession of the drugs found in the bedroom and the possession was “with the intent to deliver.” 1 Chatterton RP (Sept. 12, 2007) at 11.

At trial, the State questioned six witnesses regarding drug sales by Ms. Christy, not charged here. Mallary Bruegeman testified Ms. Christy gave her methamphetamine during a five-month period of time, up until February 2007. When asked where Ms.

Christy kept the drugs, Ms. Bruegeman testified, “[s]he would have different places she kept it, but usually in her room in her lockbox.” 1 Chatterton RP (Sept. 12, 2007) at 53. Additionally, Ms. Bruegeman testified Ms. Christy would have “at least ten customers a day.” 1 Chatterton RP (Sept. 12, 2007) at 56.

Mr. Cook testified Ms. Christy started providing him with methamphetamine approximately two years ago. He testified he purchased methamphetamine from her “[a]nywhere from 50 to 100 times.” 1 Chatterton RP (Sept. 12, 2007) at 76. When asked where Ms. Christy stored her drugs in her residence, Mr. Cook testified, “[t]here towards the end, it was in a metal box that was in her closet.” 1 Chatterton RP (Sept. 12, 2007) at 81.

Tia Haynes testified Ms. Christy sold her methamphetamine in “December or January of 2006.” 1 Chatterton RP (Sept. 12, 2007) at 127. She further testified she purchased methamphetamine from Ms. Christy on more than one occasion, and she observed Ms. Christy giving the drug to other people. Additionally, Ms. Haynes testified the methamphetamine was stored “[i]n [Ms. Christy’s] lockbox in the bedroom.” 1 Chatterton RP (Sept. 12, 2007) at 133.

Ms. Fortin testified Ms. Christy first gave her methamphetamine during the winter of 2005, and subsequently, Ms. Christy gave her methamphetamine “[m]ore than a hundred” times. 1 Chatterton RP (Sept. 12, 2007) at 146. Ms. Fortin further testified she observed Ms. Christy deliver methamphetamine to other people. When asked

where Ms. Christy kept her methamphetamine supply, Ms. Fortin testified, “[i]t was in different places. Towards the end, she kept it in a strong box that was bolted into her closet.” 1 Chatterton RP (Sept. 12, 2007) at 148.

Ron Jones testified he purchased methamphetamine from Ms. Christy “three times at her house and . . . at least two or three more times at my house,” beginning “around Christmastime.” 2 Chatterton RP (Sept. 12, 2007) at 202. He further testified he observed other individuals purchase methamphetamine from Ms. Christy. Additionally, Ron Jones¹ testified Ms. Christy told her she obtained the lockbox because people were stealing her money and her drug supply.

Finally, Matt McCabe testified he purchased methamphetamine from Ms. Christy “[a]bout 16, 17 times.” 2 Chatterton RP (Sept. 12, 2007) at 253. He testified the transactions occurred in the dining room area of Ms. Christy’s residence, and the drugs came from her room. Mr. McCabe also testified he was beat up by an individual named Elvis Dyer, who was sent to his house by Ms. Christy to collect drug money he owed her. Defense counsel objected to this testimony as irrelevant.

Both Mr. Cook and Ms. Fortin testified about the controlled buys. Mr. Cook testified he was untruthful with the police officers involved, in that he used methamphetamine during his controlled buys. Ms. Fortin also testified she was untruthful with the police, in that she lied about the cost of the methamphetamine

¹ To avoid confusion, this witness will be referred to by his full name. We use “Mr. Jones” to refer to Karl Wayne Jones, the alleged purchaser in count I.

purchased during her controlled buy, so she could use a portion of the buy money to pay off an outstanding debt.

Regarding count I, Mr. Jones testified he was 48 years old, and had used methamphetamine “[f]our or five times a week” since he was 25 years old. 1 Chatterton RP (Sept. 12, 2007) at 171, 172. He testified he purchased methamphetamine from Ms. Christy more than 50 times since September 2006, with the last purchase made on March 3, 2007. Mr. Jones testified Ms. Christy stored her methamphetamine “[i]n her closet in an army box.” 1 Chatterton RP (Sept. 12, 2007) at 181. When asked whether the methamphetamine he purchased from Ms. Christy always had the same effect on him, Mr. Jones answered, “[n]o. Sometimes different. . . . Sometimes you wouldn’t feel nothing, sometimes you would.” 1 Chatterton RP (Sept. 12, 2007) at 191. Mr. Jones testified this methamphetamine was weaker than the methamphetamine he had obtained in previous years. No samples of the substances delivered to Mr. Jones were collected, and therefore, no forensic tests were conducted.

The State called several police officers involved in the controlled buys and the execution of the search warrant. A forensic scientist testified the substances obtained during these events contained methamphetamine.

Mr. Andrews testified for Ms. Christy, basically taking all the blame for the charged crimes. Ms. Christy testified, denying any criminal activity and shifting the blame to Mr. Andrews, and denying she had access to the lockbox.

The jury found Ms. Christy guilty of all five counts. She appealed.

ANALYSIS

A. ER 404(b) Bad Act Evidence

The issue is whether the trial court erred in admitting bad acts evidence under ER 404(b).

We review a trial court's evidence rulings for an abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). "When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Under ER 404(b), "prior misconduct is not admissible to show that a defendant is a 'criminal type', and is thus likely to have committed the crime for which he or she is presently charged." *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). ER 404(b) does allow evidence of prior misconduct that has "some additional relevancy beyond mere propensity." *State v. Holmes*, 43 Wn. App. 397, 400-01, 717 P.2d 766 (1986). If "the evidence is offered for a legitimate purpose, then the exclusion provision of rule 404(b) does not apply." *Lough*, 125 Wn.2d at 853.

“To justify the admission of prior acts under ER 404(b), there must be a showing that the evidence (1) serves a legitimate purpose, (2) is relevant to prove an element of the crime charged, and (3) the probative value outweighs its prejudicial effect.” *State v. Magers*, 164 Wn.2d 174, 184, 189 P.3d 126 (2008) (citing *State v. DeVries*, 149 Wn.2d 842, 848, 72 P.3d 748 (2003)). “Additionally, the party offering the evidence of prior misconduct has the burden of proving by a preponderance of the evidence that the misconduct actually occurred.” *Lough*, 125 Wn.2d at 853. “Evidence is relevant if it has a tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” *Magers*, 164 Wn.2d at 184 (citing ER 401).

Here, the trial court identified two reasons for allowing evidence of other drug deliveries relevant to the delivery in count V. First, the evidence shows Ms. Christy’s intent to deliver the methamphetamine found in the lockbox. Second, the evidence shows Ms. Christy possessed the methamphetamine in the lockbox.

In *State v. Thomas*, Division One of this court held evidence of the defendant’s participation in prior drug deliveries was related to the issue of intent to manufacture or deliver. See *State v. Thomas*, 68 Wn. App. 268, 269, 273, 843 P.2d 540 (1992). There, the court found, “[t]hat evidence logically relates directly to the material issue of what [the defendant] intended to do with the cocaine he possessed when he was arrested.” *Thomas*, 68 Wn. App. at 273. In addition to finding the evidence relevant to

show intent, the court also held the evidence was relevant to provide a complete picture of the surrounding events. *Id.* at 273-74.

In *State v. Wade*, the trial court admitted two delivery convictions under ER 404(b) as evidence of a similar intent. *State v. Wade*, 98 Wn. App. 328, 332, 989 P.2d 576 (1999). Because the prior delivery acts occurred about 10 and 12 months before the charge at issue, Division Two of this court held the trial court erred in admitting the prior acts to prove intent, reasoning it was mere propensity evidence. *Id.* at 337.

Here, the State questioned six witnesses regarding countless other unproven drug deliveries by Ms. Christy, occurring primarily from her residence within two years preceding the trial. Unlike *Thomas*, this evidence neither establishes continuous intent nor provides a complete picture of the discovery of the methamphetamine in the lockbox on March 4, 2007. *See Thomas*, 68 Wn. App. at 273-74.

The facts in *Wade* more closely resemble our facts, even considering Ms. Christy's defense blaming Mr. Anderson and her claim he had exclusive possession of the lockbox. *See Wade*, 98 Wn. App. at 337. Like in *Wade*, the sole relevancy of this evidence is the propensity to commit the charged crime based upon extensive, vague, undifferentiated drug sales and bad act observations occurring over a long period of time. *See id.* Thus, our facts showing well over 100 acts are far more egregious than those found in *Wade* where a mere two proven deliveries were the focus. *See id.* at 332. We find no record that the trial court determined the numerous alleged prior bad

acts were proved by a preponderance of the evidence. See *Lough*, 125 Wn.2d at 853. Further, the trial court failed to give any limiting instruction to guide the jury by limiting the probative use. See *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (stating when ER 404(b) evidence is admitted “a limiting instruction must be given to the jury”) (citing *Lough*, 125 Wn.2d at 864).

Because the methamphetamine was not found on Ms. Christy’s person, the State had to establish constructive possession. See, e.g., *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971) (identifying the two types of possession, actual possession and constructive possession). The State needed to prove Ms. Christy had dominion and control over the methamphetamine found in the lockbox on the critical date. See *State v. Tadeo-Mares*, 86 Wn. App. 813, 816-17, 939 P.2d 220 (1997). The testimony of other drug deliveries by Ms. Christy does not assist in making this showing, but strongly suggest that because she delivered drugs in the past alleged uncharged crimes, she had the propensity to do so again. Because the evidence was not “relevant to prove an element of the crime charged” the trial court erred in admitting the bad act evidence. See *Magers*, 164 Wn.2d at 184 (citing *DeVries*, 149 Wn.2d at 848).

Evidentiary errors under ER 404 are of constitutional magnitude and are not harmless when, “within reasonable probabilities . . . the outcome of the trial would have been different if the error had not occurred.” *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Given the magnitude of the bad acts evidence, six witnesses

testifying to countless unproven drug deliveries by Ms. Christy over a two-year period, we cannot say Ms. Christy would have been convicted absent the propensity evidence, especially without a limiting instruction. And, considering the sheer mass of unfiltered, unproven propensity evidence we cannot say a limiting instruction could have offset the resulting unfair prejudice had one been employed. We are further troubled by the trial court's failure to conduct an on-record balancing of the probative value versus the prejudicial effect of the evidence. *See State v. Carleton*, 82 Wn. App. 680, 686-87, 919 P.2d 128 (1996).

Likewise, the trial court abused its discretion in admitting Mr. McCabe's testimony that he was beat up by an individual sent to his house by Ms. Christy to collect drug money. Although the objection was based on relevancy alone, rather than ER 404(b), this testimony was irrelevant. *See* ER 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

In sum, we conclude the trial court committed reversible error affecting all of Ms. Christy's convictions when it allowed extensive and unproven propensity evidence against her.

B. Evidence Sufficiency

The issue is whether sufficient evidence supports Ms. Christy's conviction for

delivery of a controlled substance to Mr. Jones, as charged in count I. Ms. Christy contends the evidence was insufficient to establish the substance delivered to Mr. Jones was a controlled substance.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). “[W]hen the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

In order to convict a defendant of possession of a controlled substance with intent to deliver, the trier of fact must find the defendant delivered a controlled substance. RCW 69.50.401(1). Here, no samples of the substances delivered to Mr. Jones were collected, and therefore, no forensic tests were conducted.

Nonetheless, “[g]enerally, a chemical test is not vital to uphold a conviction for possession of a controlled substance.” *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). “Circumstantial evidence and lay testimony may be sufficient to establish the identity of a drug in a criminal case.” *State v. Hernandez*, 85 Wn. App. 672, 675-76, 935 P.2d 623 (1997).

In *Colquitt*, the sole controlled substance evidence was “a statement that the

officer thought the substance appeared to be cocaine and that the substance tested positive in a field test for cocaine.” *Colquitt*, 133 Wn. App. at 794. The court found this evidence insufficient to support the conviction. *Id.* However, the court reasoned, “circumstantial evidence may be sufficient [to establish the identity of a controlled substance].” *Id.* at 800. The court observed that proper evidence of an officer’s experience and training “would allow him to properly identify the items as cocaine.” *Id.* at 801. The *Colquitt* court recognized, “[c]ircumstantial evidence must prove the identity of the substance beyond a reasonable doubt.” *Id.* The court provided a non-exhaustive list of factors to aid in determining whether the State has met this burden:

(1) [T]estimony by witnesses who have a significant amount of experience with the drug in question, so that their identification of the drug as the same as the drug in their past experience is highly credible; (2) corroborating testimony by officers or other experts as to the identification of the substance; (3) references made to the drug by the defendant and others, either by the drug’s name or a slang term commonly used to connote the drug; (4) prior involvement by the defendant in drug trafficking; (5) behavior characteristic of use or possession of the particular controlled substance; and (6) sensory identification of the substance if the substance is sufficiently unique.

Id. (citing *State v. Watson*, 231 Neb. 507, 514-17, 437 N.W.2d 142 (1989)).

Here, Mr. Jones testified he had used methamphetamine “[f]our or five times a week” for 23 years. 1 Chatterton RP (Sept. 12, 2007) at 171, 172. He referred to the substance he purchased from Ms. Christy as methamphetamine. While he thought Ms. Christy’s methamphetamine was weaker than that he had obtained in previous years, he was not unsure of the nature of the substance. Ms. Fortin and Mr. Cook both

testified the substance purchased during the controlled buys was methamphetamine. And, the forensic scientist established the substances obtained during the controlled buys contained methamphetamine. The controlled buys took place within the charged time period for delivery to Mr. Jones. Even Mr. Andrews testified the substance he sold out of Ms. Christy's residence was methamphetamine.

Given the circumstantial evidence, the evidence sufficiently establishes the substance delivered to Mr. Jones was a controlled substance, methamphetamine.

Reversed and remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Report, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Kulik, A.C.J.

Sweeney, J.